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TO: Members of the Senate Committee on Judiciary, Corrections, Insurance Campaign Finance Reform and Housing
FR: Attorney Carol Hatch, Chair, Real Property, Probate & Trust Law Section (RPPT)
Date: February 18, 2010
RE: SB 529 - uniform power of attorney for finances and property

We write to ask that you support SB 529 relating to uniform power of attorney for finances and property. This draft is the result of a working group that included members of the RPPT Section, the Elder Law Section, the Coalition of Wisconsin Aging Groups, the Department of Health Services, the banking industry and consumer advocates. This group conducted an in depth study of the uniform act. We believe SB 529 would promote acceptance of durable powers of attorney and address problems in the current law that allow abuses. We especially want to thank State Senator Fred Risser (D-Madison) and State Representative David Cullen (D-Milwaukee) for sponsoring this legislation.

In 2002, the Uniform Law Commission conducted a national study of durable powers of attorney. Of the 371 probate and elder law attorneys and others who responded to the survey, sixty-four percent said they had encountered instances of abuse of durable power of attorney arrangements. A follow-up report by the American Association of Retired People Public Policy Institute, in conjunction with the American Bar Association Commission on Law and Aging, found that most state laws came up short in protecting vulnerable principals from financial abuse by agents.

Responding to these concerns, the Uniform Law Commission introduced the Uniform Power of Attorney Act in 2006. Since that time, a group of interested attorneys and stakeholders have considered refinements to conform current Wisconsin law to the national guidelines. . The State Bar's Real Property, Probate, and Trust Section and the Elder Law Section have been active participants in this study group.

The proposed Wisconsin law will do the following:

- Preserve the effectiveness of durable powers as form of surrogate decision-making.
- Provide safeguards for the protection of the principal, the agent, and persons who rely on the agent's authority.
- Specify the types of authority that can be granted to an agent and require express authorization by the principal when certain types of authority – for example, the authority to make gifts – could dissipate the principal's property or alter the principal's estate plan.
- Offer clearer guidelines for the agent, who is often a trusted family member.
- Encourage acceptance of a power of attorney by third parties by providing protections for the good faith acceptance or refusal of an acknowledged power of attorney.
- Offer an additional protective measure for the principal by providing that third persons may refuse to accept the power and report to an appropriate agency or to law enforcement if they believe that "the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent."

State Bar of Wisconsin

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The Uniform Power of Attorney Act protects those persons who wish to name an agent under a durable power attorney while also offering transparency and protection for those who are asked to accept the powers of attorney. The Real Property, Probate, and Trust Section strongly encourage you to support these needed changes. Please feel free to contact us if you have any questions or need additional information. Thank you.

For additional information contact Cale Battles, Government Relations Coordinator, at (608) 250-6077 or cbattles@wisbar.org.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

Elder Law Section Board



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TO: Senate Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing Committee

FR: Elder Law Section

RE: support for SB 529/AB 704 relating to uniform power of attorney for finances and property

The Elder Law Section of the State Bar of Wisconsin strongly supports SB 529/AB 704, which would amend Wisconsin's law regarding durable powers of attorney for finances and other property. The Section has worked closely in the development of this proposal, which is based on the Uniform Power of Attorney Act, to ensure that its provisions square with other related Wisconsin laws.

The Elder Law Section has consistently supported policy that encourages individuals to plan ahead for substitute (also known as "surrogate") decision-making, in the event of later capacity. Planning ahead, by delegating the individual(s) to handle and manage financial matters, helps effectuate one's own preferences, relieves burdens on families and avoids the need for more intrusive and expensive guardianships. It is critical that statutory forms, which are often completed by individuals without any legal counsel, are clear and straightforward, and include default provisions that best protect an unsophisticated public. This bill does so by many important provisions: (1) it uses the term "incapacity" that is consistent with Wisconsin guardianship law; (2) it creates a default that the document becomes effective at time of signing and remains durable; (3) it clarifies the rules regarding co-agents and successor agents' reimbursement and compensation.

This proposal represents a huge step forward in protecting the interests of the individuals who execute these financial advance planning documents (the "principals"), the individuals they appoint ("agents") and the third parties who are asked to honor the documents, e.g., financial institutions. Relevant provisions include codification of the agent's duties and setting out a comprehensive list of persons who may petition the court to review the agent's conduct. The bill also codifies critical rules of existing case law related to durable powers of attorney, including the fiduciary responsibility of agents and limitations on gifting the principal's property absent express delegation.

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The bill also, very importantly, provides guidance to the institutions asked to honor the document and exempts them from liability for good faith honoring of them. The bill also provides situations where a person or institution may refuse to accept the power of attorney, including where it would be inconsistent with federal law, when it is believed that the document has been revoked, is illegal, or is being inappropriately used.

Finally, the bill provides a statutory form that is a vast improvement over current law, including step-by-step instructions and a sample certification form. Wisconsin is poised to follow the lead of other forward-looking states in passing this Uniform Power of Attorney Act, providing both consumer-friendly and good consumer protections in this critical area of advance planning.

The Elder Law Section strongly urges your support for SB 529/AB 704. Thank you.

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If you have questions about this memorandum, please contact Sandy Lonergan, Government Relations Coordinator, at slonergan@wisbar.org or (608) 250-6045.